IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Nos. 587, 588, 589.

EDWIN J. CREEL
Petitioner

vs.

ROBERT T. CREEL
Respondent

REPLY BRIEF BY PETITIONER AND AFFIDAVIT IN SUPPORT THEREOF

EDWIN J. CREEL,
in proper person.

INDEX

I.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Edwin J. Creel, respectfully submits the following as his Reply, to the Brief in opposition, as filed herein by Respondent, on November 29, 1945.

The Gross Falsification of Respondent's Brief.

As more fully set out later on herein, Respondent's Brief is a maze of inexcusable falsifications; and in particular of vicious attempts to "smear" this Petitioner, by falsification of Petitioner's statements of legal authorities.

Petitioner charges that Respondent's Brief is also a maze of further contemptuous falsification of authorities, and of supposedly clever "double talk"; and both of which—in Petitioner's opinion—were clearly intended to trick and deceive the Court.

Some of the more glaring of these falsifications by Respondent will presently be set out as a preliminary matter. The remainder will then be set out in somewhat great detail, later on in this Reply.

The Admissions and Claims of Respondent's Brief.

In addition to the above mentioned falsifications, Respondent has also made a number of admissions and claims; and these said admissions and claims not only serve to clarify the issues; but they also show that the analysis of controlling issues—as set out in Petitioner's substitute Petition, pp. 14-18—is fully as conclusive as is there indicated.

A summary outline of these said admissions and claims by Respondent will presently be set out; and that outline will then be followed by a more detailed analysis of their bearing on the actual facts of the case.

Before taking up this direct reply to Respondent's Brief on the merits; Petitioner asks consideration of certain preliminary matters as follows:

Reference to Supporting Affidavit.

As set out in *General Excavator v. Keystone*, 290 U. S. 240, this Court has always upheld the rule, that it would deny its aid to any party who has been guilty of unconscionable conduct in

relation to the subject matter of the suit. And although Petitioner has found no specific references on the matter, it appears that the Court considers the question of unclean hands to be a matter that may affect its jurisdiction as a Court of Equity, to act in the matter at all.

As a jurisdictional matter, it appears that evidence of unclean hands of a party, can be introduced by affidavit in an appellate court, under the rule of *County of Dakota v. Glidden,* 113 U. S. 222; 28 L. Ed. 981; and as appears to be even more definitely authorized by the following quotation from *Walter v. Walter,* 15 D. C. App. 345:

> "It is a maxim of equity that he who seeks the intervention of a court of equity must come in with clean hands. The application of the maxims of equity does not stop with the adjudication of right, it extends as well to the remedy, and at any and every stage of a cause, a court of equity may stay its hand, whenever it appears that it would be inequitable to proceed further." *Walter v. Walter,* 15 D. C. App. 345.

Most of the falsification of which Respondent has been guilty in his brief; is based on facts that are set out in the 929 page record in this cause; and most of which said record has been brought up by Petitioner for that very reason.

However, a further considerable amount of falsification of Respondent's Brief is a falsification of facts that have developed since the record was made up in the District Court; and such for example as the statement that Petitioner does not want to purchase the business, but only wants to keep the receivership in operation because of a spite against Respondent; and whereas since the date of the sale to Petitioner on February 1, 1944, the business has earned in excess of $175,000, and its net worth is now estimated to be in excess of $525,000.

The total cash on hand and in the firm's bank balance is now in excess of $225,000 on the average, with all bills paid. And

for Respondent to claim, as he does in his brief, that Petitioner does not want to take over that $525,000 business by paying Respondent a portion of that $225,000 bank balance, is simply willful and inexcusable falsification of the part of Counsel for Respondent.

And for Counsel to say—as he does on p. 7 of his Brief—that Petitioner was not aggrieved by being stripped of the right to take over the business, when it has not been disputed that the business has been earning over $70,000 a year as stated by Petitioner in open Court (R. 462), is a further inexcusable falsification by Counsel for Respondent.

Of course the above figures can be arrived at approximately by an estimate based on facts shown by the record. It is Petitioner's opinion, however, that they can better be shown by a supporting affidavit, introduced in this Court under the unclean hands rule, and as is indicated by the quotation from *Walters v. Walters,* as above set out.

Certain other facts, however, cannot be thus shown by the record.

For example, it has been discovered, since the record was made up in the Court of Appeals, that the great bulk of the District Court records in the case—and these constituting a pile nearly five feet high—have been criminally hidden, or criminally stolen or destroyed.

And since this destruction of Court records is merely the last, of several open or concealed attempts to keep hidden the fraud that is being carried on in this case, it is Petitioner's opinion, that these further facts can properly be shown by supporting affidavit, and as is filed by Petitioner in connection herewith.

And if the Court is of the opinion that these matters cannot be introduced in this Court by affidavit, then Petitioner prays that the Court suspend action on this Petition; and that Petitioner be given an opporunity to introduce these matters by affidavit in

the District Court; and to then have them brought up to this Court by certiorari, in the more usual fashion.

Reference to Substitute Petition.

There is now pending before the Court a motion by Petitioner for permission to file a substitute 44 page Petition for writs of Certiorari, in lieu of the incomplete 30 page Petition, as filed originally in this Court on November 5, 1945.

As set out more fully in that said motion; the circumstances which necessitated the filing of that motion are as follows:

1. It is Petitioner's opinion that certain of Petitioner's inventions, and certain of Petitioner's scientific discoveries are now of immense importance to the National reconversion and Post-war programs.

2. On the sudden collapse of Japan last August, it seemingly became apparent that one—or really a group—of Petitioner's shipping inventions, would be of immense importance to the determination of the question, as to the disposition to be made of our 40,000,000 tons of excess merchant shipping.

3. In an effort to bring out that invention ahead of these petitions, Petitioner found it necessary to ask for a 30 day extension of time to file these said petitions. Then, on the release of further information as to the claims for the Atomic bomb, it became apparent that the said shipping invention might be of even greater importance, to the determination of the question as to the size and character of our post-war navy.

4. Because of this added complication, it became necessary for petitioner to ask for a second 30 day extension. Then in a final effort to bring out that said invention ahead of this Petition; Petitioner cut his time too short for preparation of his said petitions.

5. Petitioner had planned on filing three separate petitions for the three appeals. Because of the shortness of the remain-

ing time, Petitioner changed his plans, so as to try to file but two petitions covering the three appeals. But, because of the immense complexity that has been brought about by the falsification of law and of fact by Counsel for Respondent, and as is set out more particularly in this reply, Petitioner found it impossible to complete his two said petitions within the remaining time. Petitioner then changed his single petition on Appeal No. 8,770, so as to make it cover, at least partially all three appeals; and Petitioner relied then on the fact that this Court will seemingly consider questions which affect the jurisdiction of this Court, or of the Court below—and whether assigned or not.

6. Because of the many changes in plan, petitioner found it then impossible to complete even that single petition within the remaining time. Petitioner thus filed an incomplete and uncorrected copy of that said single petition. Petitioner then had run off a further 50 corrected copies.

7. Then, on November 15th, Petitioner served a copy of both the original and of the corrected petitions on Counsel for Respondent. Petitioner asked consent of Counsel to substitute the corrected copy for the original uncorrected copy on file in the Court.

8. Counsel refused his consent; and Counsel then further made his own brief a veritable maze of falsification, and of deliberate attempts to trick the Court, by falsification of facts, and of authorities; and by attempts to conceal the crucial bearing of Petitioner's appeal of March 10, 1944, on the principal issues in the case.

9. Under these conditions it became necessary for Petitioner to prepare a substitute petition, to meet that added load of falsification. However, Petitioner was informed that the Court was expected to act on the Petition on December 15th. It was necessary for Petitioner to have that printing done out of town; and—because of traffic conditions—and the crowded conditions in the printing trade—Petitioner found it impossible to fully

revise and complete that said substitute Petition by December 14th.

10. It has thus became necessary for this present reply to carry a considerable part of the load of meeting the extreme falsification of which Counsel for Respondent has been guilty in his said brief.

11. The original and substitute Petitions are substantially equivalent, except that an amplified statement of fact, as to Appeal No. 8,770, and a preview of the more controlling issues as to all three appeals; and an appendix setting out the text of Sec. 847, have been inserted in the revised 44 page Petition. By error, however, the section on variance as the principal ground of the appeal of March 10th, was omitted from the revised Petition.

12. And should the Court consider it inadvisable to grant permission for substitution of that said revised 44 page petition, for the original 30 page petition; then Petitioner respectfully prays, that the Court consider that said 44 page revised petition as a part of Petitioner's present reply brief; if the Court considers such a request to be proper under the circumstances.

Preliminary Statement as to Falsification by Respondent of Petitioner's Statement as to Sec. 847.

As a preliminary matter, the attention of the Court is called to the inexcusable falsification to which Counsel for Respondent has resorted on pp. 13 and 14 of his brief; and where he has willfully falsified Petitioner's statement as to Sec. 847, Title 28, U. S. C.; and to the effect that Petitioner made a "new claim" that Sec. 847 prohibited the judicial sale of real estate at private sale.

The facts are of course that the fourth "sub-division" of Sec. 847, was enacted in 1934, for the specific purpose of authorizing a private sale of real estate.

What Petitioner really claimed, on p. 10 of the original petition (or page 16 of the substitute), is that it appears from rules long established by this Court (*U. S. v. Chase,* 135 U. S. 255, 260; 34 L. Ed. 117), that the more general provisions of the 4th "sub-division" of Sec. 847, Title 28, U. S. C., which authorizes a private sale of real estate; is apparently overruled by the third, and more specific "Sub-division"; which requires that any interest in land, that is sold under order or decree of any U. S. Court, *must be sold at public sale, if it is in the hands of a Federal receiver, at the time it is offered for sale.*

It appears that this question has never been passed upon by any court. In *Prudential Ins. Co. v. Land Estates,* 19 F. Supp. 401, however, the Court seemingly approved the construction contended for by Petitioner; but, in that case, the Court ruled that the provision was inapplicable, because the sale in question was not a judicial sale.

In any event, it is clear—in Petitioner's opinion—that that misquotation by Counsel for Respondent, was a deliberate falsification.

Falsification by Respondent of Petitioner's Statement of the Rule of Forgay v. Conrad.

The attention of the Court is called to a further willful falsification by Counsel for Respondent of Petitioner's statement of the rule of *Forgay v. Conrad,* as set out on p. 23 of the original petition, or p. 36 of the substitute.

As there stated by Petitioner, that rule is "that an interlocutory order is final and appealable, if it is immediately executable, and if material injury could be caused to a party thereby. Counsel for Respondent has falsified Petitioner's statement of that rule, by changing the "and" to "or"; and so that it would appear that Petitioner had said that the rule of *Forgay v. Conrad* was "that an interlocutory order is final and appealable if it is

immediately executable, OR where it might cause irreparable injury to the party affected thereby.

And in Petitioner's opinion, this too was a deliberate falsification.

Respondent's Falsification of Petitioner's Statement of "Questions Presented."

The attention of the Court is further requested to the willful falsification by Respondent in his brief, of the questions presented by Petitioner.

For on page 5 and 6 of his brief he states that it is very difficult to determine what questions Petitioner desires to present on pages 23 to 26 inclusive of the original Petition.

He then proceeds to falsify the list of questions presented by Petitioner, by leaving out the major questions by Petitioner, and substituting therefor a list on which it is reasonably certain a writ of certiorari would not be granted.

Respondent's Falsification of the Rule of Bronson v. LaCrosse.

The attention of the Court is further requested to the falsification by Counsel for Respondent, of the rule of *Bronson v. LaCrosse, I Wall.* (68 U. S.) 405, 411; 17 L. Ed. 616, 618.

Counsel cites that case as supposed authority for a rule; that while an appeal is pending, the District Court retains all power necessary to preserve and protect the property in dispute, even to the extent of selling out and finally disposing of the subject matter of the pending appeal.

It is Petitioner's opinion that that mis-citation was a deliberate contempt of the Court.

For Counsel was well aware, that that decision which he cites as authority, for the sale, by the District Court, of the subject matter of a pending appeal, *was actually handed down on a*

petition for a writ of prohibition, to be directed to the District Court, and for the purpose in part of preventing that court from passing orders, affecting the subject matter of a pending appeal.

In that case, this Court said that, *as the Court below needed but to be advised, of the opinion of this Court, the writ of prohibition would be withheld.* And now Counsel for Respondent cites that case as authority, for his contention that the District Court retains jurisdiction over the subject matter—not merely to pass relatively minor orders as in *Bronson v. LaCrosse*—but actually to dispose of the entire subject matter of the appeal.

Scheme for Orientation.

As a further preliminary to a consideration of the aforesaid claims and admissions made by Respondent—and to a recapitulation of the principal facts as to the three appeals, as they relate to the said admissions and claims by Respondent; it should be noted that although only three appeals are covered by this petition; a fourth and prior—but later dismissed—appeal of March 10th (R. 298), is of crucial importance to any consideration of the three appeals that were brought up.

It is Petitioner's opinion that the Court will find it helpful—toward keeping in mind the relationships of these said four appeals—if the following scheme for orientation is adopted.

That is, it should be considered that the said four appeals actually constitute two largely distinct "Cases"; and which said cases will be referred to as Case I and Case II.

It should then further be considered, that each of these said "Cases," is made up of both a "Main" appeal, and also a prior "anticipating" or "blocking" appeal.

PETITIONER'S "CASE I" thus consists of a "Main" Appeal No. 8,770, and a prior "blocking" appeal, not numbered, but which will be referred to as "the appeal of March 10, 1944."

The purpose of Petitioner's said "Main" appeal No. 8,770 is —as stated—to have reversed or quashed, an Order for Resale

(R. 339), that was entered by the District Court—on March 22, 1944—against this Petitioner, as an alleged defaulting purchaser.

Petitioner also asks—as before stated—that this Court then decree that the business be turned over to Petitioner, at Petitioner's bid price of $240,500—and as of the original sale date of February 1, 1944—and under the terms of the original Order of Sale (R. 231), and as those terms might be properly interpreted by this Court.

PETITIONER'S "CASE II" consists of a "Main" Appeal No. 8,910, and a prior "blocking" Appeal No. 8,823.

The purpose of this second "Main" Appeal No. 8,910 is to have reversed and quashed, an order of the District Court of October 9, 1944, and which said order purported to finally confirm the sale of the partnership business to Respondent at a bid price of $240,000, and as of a sales date, of May 1, 1944.

Reference to the Chronological List of Principal Events of the Three Appeals, as Set Out in Appendix "B."

As a further possible aid to the Court, in considering the interrelationships of the four appeals involved in this case, Petitioner has included, as Appendix "B" to this Brief, a chronological list of the principal events underlying the three appeals in this case; and as to their relationship, to the unnumbered, but highly important appeal of March 10, 1944. (R. 298.)

THE CLAIMS AND ADMISSIONS OF RESPONDENT'S BRIEF, AND PETITIONER'S REPLY THERETO

As stated, Respondent's Brief, as filed herein on November 29th, contains a number of admissions and claims; and many of which are—in Petitioner's opinion—fatal to the contentions of Respondent.

In the following outline, of the more important of those said admissions; references will generally be made to the record and to the appropriate page number in the accompanying Appendix "B."

Item 1.

As Item 1, it now stands admitted on the record, by Respondent, that Petitioner's appeal of March 10, 1944 (R. 283) was a valid appeal; and that consequently jurisdiction was transferred to the Court of Appeals as of March 10, 1944, and so that the Order for Resale (R. 339) was wholly illegal and void.

And this is true, because nowhere in his said brief, does Respondent question the validity of that said appeal of March 10th, except by inuendo and "double talk." Furthermore, it is apparent that Respondent has made strenuous efforts to try to cover up and conceal from the Court, the existence and identity of that said Appeal of March 10th.

Thus as Question II (a) on p. 24, of the original petition, Petitioner advanced in question form, the precise contention set out above. That question is as follows:

> "Whether the Court below erred in failing to hold (a) that the said Order for Resale must be set aside and quashed because—by reason of the filing of the appeal by Petitioner, on March 10th (R. 298), from the order confirming sale of the property to Petitioner (R. 283); all jurisdiction over the subject matter was transferred to the Court of Appeals; and so that the Order for Resale, as entered by the District Court on March 22nd is wholly null and void; and
>
> (b) Whether the Court below erred in failing to follow in this respect, the applicable decision of this Court in *Newton v. Consolidated Gas,* 258 U. S. 177; 66 L. Ed. 548."

On page 6 of his brief, Respondent attempts to evade that question by making the false assertion that Petitioner's "Ques-

tions Presented" cannot be understood. Respondent therefore restates that said questions II(a) so as to make it wholly unintelligible, as follows:

> "(1) That at the time each of the orders was signed by the District Court, there was pending in the Court of Appeals, an appeal from a prior order and, consequently, the lower Court had no jurisdiction to pass any of the orders of which he complained."

The total amount of reference to that important appeal of May 10th, in the brief for Respondent, is as follows:

> p. 4. "Immediately (after the sale of February 1st to Petitioner) the sale was confirmed to Petitioner with the consent to Respondent (R. 283). Petitioner appealed to the United States Court of Appeals for the District of Columbia from this Order confirming the sale to him on his own bid, which appeal was subsequently dismissed by that Court on May 12, 1944."

> p. 6. "He (Petitioner) was always of the opinion that by noting an appeal from any order of the District Court, even though in his favor (like the one confirming the sale to him), he could oust the District Court of jurisdiction pending the disposition of his successive appeals, and thus prolong the litigation endlessly."

The appeal of March 10th, from the Order confirming sale to Petitioner, was the first of the four appeals involved in this petition. Respondent referred to that appeal of March 10th in the paragraph just quoted; but in the next paragraph below, Respondent refers to the Order of Resale of March 22nd, as the first of Petitioner's appeals, and as set out below:

> p. 6. "His first two appeals did not "block" the sale or oust the lower Court of jurisdiction for the following reasons:
>
> (a) The first two orders were not final orders as they

required confirmation. As long as confirmation is required, in an order for sale or resale, that order is not a final order."

It will be thus seen that in the first paragraph of his argument, Respondent speaks of Petitioner's appeal of March 10th, and then in the next paragraph he refers to Petitioner's appeal of March 22nd, as Petitioner's first appeal. Obviously such a reference was intended only to deceive the Court.

Respondent's next reference to the Appeal of March 10th is at the bottom of page 7 of his brief where he says:

p. 7. "He (Petitioner) then appealed from the order of resale. At that time there was also pending in the Court of Appeals his appeal from the order confirming the sale to him. Notwithstanding, the fact that these two appeals were pending, the Petitioner attended the resale and endeavored to purchase the property offered for sale by bidding therefor, an action entirely inconsistent with the two appeals noted by him before the resale."

"His action indicated that both of his appeals were abandoned and that the order of resale was a valid effective order, under which the Petitioner was willing to and would take title if his bid was accepted."

Counsel here makes the willfully false argument that Petitioner's bidding at that said resale of May 1st, indicated that Petitioner's two appeals were abandoned; and whereas the facts were that immediately preceding that said resale, Petitioner handed to the Receiver a five page letter (R. 362-367) in which Petitioner specifically notified the Receiver that Petitioner was accepting return of the $10,000 deposit, as being necessary for the protection of Petitioner's interests; and without prejudice to Petitioner's right to contest the validity of the said order for resale on appeal. And on page one of that letter (R. 362) Petitioner stated:

"I do not in any wise acknowledge the legality of the Court's order of March 22nd, in declaring myself in default,

and in ordering the resale of the property, and either at my expense and cost or otherwise."

And on the last page of that letter which was handed to the Receiver, immediately preceding that said resale of May 1st, Respondent notified the Receiver that he had just noted an appeal from that said order for resale.

Respondent's argument therefore, that Petitioner's action indicated that Petitioner was abandoning his two appeals is unqualifiedly false.

It will further be noted that Respondent still makes no claim that Petitioner's appeal of March 10th was not a valid appeal. For even though Respondent's claim that Petitioner had abandoned his appeal were true; that would be ground only for asking the dismissal of that appeal in the Court of Appeals. And any such so-called abandonment would do nothing whatever to return jurisdiction of the subject matter, of that appeal, to the District Court.

Furthermore, it is well settled that no estoppel against a party, or abandonment of a right of appeal, arises from any act that it was necessary for the party to take for the protection of his own interests. The authorities on the question of such estoppel are set out in the record (R. 857-858) and are summarized in the following quotation from Corpus Juris:

> Appeal and Error, Par. 212; 4 C. J. Secundum, p. 339. "A waiver is not implied from acts done or measures taken by an appellant in defense of, and to protect his rights or interests (cases) as where for such purpose he purchases property ordered to be sold by the judgment or decree . . ."

The final reference of Respondent to that appeal of March 10th, is on page 14 of his brief, where Respondent refers to the objection of Petitioner that there was a variance between the terms of the Order for Sale, and those of the Order confirming sale to Petitioner. That variance was the major ground for Petitioner's appeal of March 10th, against the order of February

9, 1944, which confirmed the sale of the partnership business to Petitioner. (R. 283.)

At the close of the top paragraph, on p. 15, however, Respondent again attempts to deceive the Court by saying: "What difference does it make, who executes the deed as long as the purchaser accepts title, and pays the purchase money." This last is clearly an attempt to deceive the Court into the belief that Petitioner's objection was to a variance in the terms of the Order of October 9th, which confirmed the sale of the partnership business to Respondent.

Petitioner's objection, however, was to a variance in the terms of the Order of Confirmation to Petitioner, on February 9, 1944, and the difference that variance made, was that Petitioner, as the purchaser, would not accept the deed if executed by the Receiver.

It is thus seen that throughout his entire brief, Counsel for Respondent has made no claim that the Appeal of March 10th, was not a valid appeal. He has, however, rephrased, and misstated Petitioner's "Question II (a)" to attempt to confuse the Court as to the bearing and importance of that said appeal of March 10th.

And at the foot of page 6, he has claimed that Petitioner's first two appeals, did not "block" the sale; but there he is referring to the Order for Resale of March 22nd, as the first appeal by Petitioner, and whereas the actual first appeal of the series, was this said appeal of March 10th.

It follows therefore that Respondent's brief stands as an open admission of the validity of that said appeal of March 10th (R. 298), and so that consequently, the Order for Resale, as entered by the District Court, on March 22nd—or ten days later —was wholly illegal and void.

Item 2.

As Item 2, of his said admissions, Respondent admits that his claimed authority for the exercise of jurisdiction by the District

Court, in entering its Order of Resale of March 22nd (R. 339) was that the Receiver claimed the business was in danger of immediate collapse, unless a sale could be closed immediately.

Respondent claims further that under those conditions—and under the rule of *Bronson v. LaCrosse,* 1 Wall (68 U.S.) 405, 411; 17 Law Ed. 616, 618, the District Court retained jurisdiction to do anything necessary to preserve and protect the assets of the business, even if that included selling out and finally disposing of, the subject matter of the appeal.

As already pointed out, however, the decision in *Bronson v. LaCrosse* was handed down on a petition for a writ of prohibition, to stop the District Court from entering orders affecting the subject matter of an appeal, after the jurisdiction of the District Court had been ousted by that said appeal. And this Court withheld the writ, only because a mere intimation that the District Court had exceeded its jurisdiction, was considered to be sufficient.

It follows that Respondent's claimed authority for the right of the District Court to enter that order of resale, while Petitioner's appeal of March 10th was pending, was not merely non-existent, but actually the cited decision was exactly to the contrary.

It thus stands admitted on the record, so far as Respondent's brief is concerned, that not only was Petitioner's appeal of March 10th a valid appeal, but also that there was no authority whatever, for the entry of the Order for Resale by the District Court on March 22nd, while that said appeal of March 10th was pending.

Item 3.

As Item 3, Respondent makes another fatal admission when he says on p. 16 of his brief, that an indulgent District Court had twice given Petitioner an opportunity to purchase the business, at the figure Petitioner himself had set.

But that claim is an open admission, as to the falsity of the Receiver's claim, that it was necessary for the District Court to

order an immediate resale, in order to prevent its total collapse of the business.

For the facts were that after that Resale was ordered; Petitioner had the right to bid on the property under the Order for Resale, and which said Resale was to be held five weeks later. Then despite the alleged danger to the business if there were any danger of its purchase by Petitioner; the Court on May 24th, gave Petitioner still another 30 days, in which to purchase the business. And finally, by the Order Nisi (R. 498), Petitioner was given until October 9th to become the purchaser, by merely offering a 10% increase in the sale price. And all of this shows that the alleged grave danger of collapse of the business, unless a sale could be immediately closed, was merely flat perjury on the Receiver's part.

Item 4.

As Item 4, Respondent asserts on page 7 of his brief that "As long as confirmation is required in an order for sale or resale, that order is not a final order. It is only an order confirming a sale that is appealable.

In this respect Counsel for Respondent is in conflict with the 7th and 3rd Circuit Courts of Appeals. For in *Investment Registry v. Chicago* (CCA 7th, 1913) 212 F. 594-603; the 7th Circuit held:

> "A decree setting aside a sale on foreclosure and ordering a resale confessedly does not end the case—that continues with all the parties that were in it before the sale.
>
> "But the bidder at the sale becomes a new party; the acceptance of his bid gives him the rights of a purchaser unless legal objections to a confirmation can be shown; and the decree which put him out of court as a party, and terminates his asserted rights as a purchaser, appears to us very clearly a final decree as to him.

"No difference is perceived by reason of the fact that he may have been a party to the foreclosure issues. In the capacity of a purchaser he certainly first became a party when the property was struck off to him at the sale.

"To say that the successful bidder at the first sale may become the purchaser at the second or subsequent sale, seems to us no answer. He may not. And the finality of a decree is to be determined by its own force, not by contingencies outside the record.

"We find nothing in *Butterfield v. Usher,* 91 U.S. 246; 28 L. Ed. 218, relied on by appellee, to require a different conclusion; and the numerous cases respecting confirmation, may rightly be taken to indicate the general opinion of the profession that decrees granting or denying confirmation, are appealable as final decrees."

And in *Smith v. Hill,* 5 F. 2nd, 188 (CCA 3rd, 1925) this same rule was upheld; and the case of *Investment Registry,* above quoted, was cited as authority, for the rule that an appeal lies from either an order confirming, or refusing to confirm, a judicial sale.

Item 5.

As Item 5, Counsel's alleged rule that it is only an order confirming sale that is appealable; brings him into conflict with the Supreme Court in *Kneeland v. American Trust and Loan Co.,* 136 U.S. 89; 34 L. Ed. 379; for in that decision this Court said:

"It was adjudged in *Blossom v. Milwaukee,* 68 U.S. (1 Wall.) 655; 17 L. Ed. 673; that a bidder at a marshal's sale makes himself thereby so far a party to the proceedings, that for some purposes he has a right of appeal. It was said by Mr. Justice Miller, in the opinion of the Court, that . . . 'A purchaser or bidder at a master's sale in chancery subjects himself quod hoc, to the jurisdiction of the Court,

and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to.' "It follows from this decision that *his right of appeal* must extend to all matters adjudicated after his bid, which affect the terms of that bid, or the burdens which he assumes thereby, and which are not withdrawn from his challenge, by the terms of the decree under which he purchases."

The alleged rule of Counsel for Respondent thus has no backing, except that it is a misinterpretation by Respondent of the ruling in the obsolete case of *Butterfield v. Usher,* 91 U.S. 246; 28 L. Ed. 218.

Item 6.

As Item 6, Counsel for Respondent admits that his sole support for his alleged rule, that only orders confirming sale are appealable, is the obviously obsolete case of *Butterfield v. Usher,* 91 U.S. 246; 28 L. Ed. 218.

For *Butterfield v. Usher* was merely a case under the old and obsolete rule that the bidding would be reopened after a judicial sale, on an offer of a 10% increase in the bid. Furthermore, under the old rules of equity, the Court held full power over its decrees until the end of the term; or even beyond, if a suitable order were made extending the time.

Usher the defendant, secured a prospective purchaser who was willing to make a $500 increase in the bid, on a piece of property the sale of which had already been confirmed to Butterfield. On Appeal, the sale to Butterfield was set aside, on the offer of the $500 increase in the bid; and on the further condition that Usher repay to Butterfield 10% interest on the money Butterfield had invested.

That procedure of reopening the bidding for an increase in the bid, has long been obsolete in this country. The citation of that

case as an authority under the totally different conditions of today, is therefore merely a mis-citation of authority.

Item 7.

Respondent claims that the supposed later sale to Respondent, was a continuation of the public sale of May 1, 1944, under the order of resale of March 22, 1944 (R. 339). On page 14 of his brief, he says:

> "Furthermore, the sale was a continuation of the second sale at public auction, held on May 1, 1944, under the order for resale of March 22, 1944.
>
> "At that sale, a controversy arose between the only two bidders (Petitioner and Respondent) as to which bid should be accepted.
>
> "At the hearing on the Receiver's report of the circumstances giving rise to such controversy, the Court rejected both bids and stated the terms on which the bidder could purchase.
>
> *"This was but a continuation of the public sale."*

What Respondent is really claiming is, that after a sale of real estate has been advertised at public auction, for four weeks as required by Sec. 849, that then the Court can reject the bids offered at the sale; and that the Court can then proceed to sell the business to anyone the Court chooses, and in any manner the Court may decide on.

No such procedure is authorized by Sec. 847, of Title 28, USC. For that section provides (as regards public sale) that

> "All real estate or any interest in land sold under order or decree of any United States Court, shall be sold at public sale, at the Court house . . . or upon the premises . . . as the Court rendering such order or decree of sale may direct.

Sec. 849 provides:

> "No sale of real estate, ordered pursuant to Sec. 847 of

this Title, . . . other than a private sale . . . shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale . . ."

Obviously the sale to Respondent did not comply with the requirements of Sec. 847, for the sale was not at public auction; it was not made at the Court house; nor upon the premises as the Court had directed; nor was the time and place of such sale advertised for four weeks prior to the said sale to Respondent as required by Sec. 849.

Item 8.

As Item 8, Respondent's claim that the sale to Respondent was merely a continuation of the public sale of May 1st, under the Order of Resale of March 22nd, brings the Court of Appeals decision in this case, squarely into conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit (1935) in *Bovay v. Townsend,* 78 F. 2nd, 343.

For in this last case, the Eighth Circuit held that the sole power of a District Court, in a public sale, under Section 847, is to confirm the sale as made at auction, or to set it aside and to order another public sale.

Item 9.

As Item 9, Respondent's claim that the sale to Respondent was merely a continuation of the sale of May 1st, under the order of Resale of March 22nd; is another fatal admission; for the assets that were to be resold under the Order for Resale of March 22nd, cannot be identified as of May 1st, the date of the supposed sale to Respondent, and since the assets supposedly sold to Respondent cannot be identified, as of May 1st, the sale to Respondent cannot be carried through in any event.

And since this is a matter of crucial importance to Respondent's whole case, Petitioner submits the following further analysis of the matters involved.

Relevant Text of the Order for Resale

The significant portions of the text of the Order for Resale, of March 22nd, 1944 (R. 339), are as follows:

Order for Resale

> It appearing . . . that Edwin J. Creel, the purchaser of *the assets of Creel Brothers sold by Erskine Gordon, Receiver herein, at public auction on Feb.* 1, 1944, has defaulted . . . it is, by the Court this 22nd day of March, 1944, Ordered . . . that said Receiver is hereby *authorized and directed to resell said assets* at public auction, under the Order for Sale of August 31, 1942, at the risk and cost of said defaulting purchaser, Edwin J. Creel." (Italics added.)

Identification of the Assets That Were to Be Resold at Petitioner's Risk and Cost.

From the above condensation of the Order for Resale, it will be seen that the assets to be resold, were not the *assets of Creel Brothers as of a new sales date.* Nor was Petitioner to be held liable, for the *difference in the proceeds of the two sales.*

Any such arrangement would have been preposterous on its face. For $130,000 *or more of merchandise might have been sold out of the merchandise stock between the original sale to Petitioner, and the resale to the new purchaser.* And *the great bulk of the* $30,000 *of accounts receivable, might have been collected, and the proceeds disposed of.*

This would have left a mere hollow shell of a business to be sold; and there might have been a loss of $100,000 or more to be assessed against Petitioner, as "loss on the resale." Obviously *no such proposal was ever intended or contemplated.*

To the contrary therefore, it may be seen, from the last paragraph of the said Order for Resale (R. 339), that the Receiver is authorized and directed, to *resell the "said assets";* that is,

the assets that were specifically referred to, in the first paragraph of that said Order for Resale.

And in the first paragraph of that said order (R. 339), it is specifically stated that *the "said assets" are: "the assets of Creel Brothers sold by Erskine Gordon, Receiver herein, at public auction on Feb. 1st, 1944."*

In other words, *the assets that were to be resold, under that said order for resale of March 22nd, were the assets that had been sold to Petitioner on Feb. 1st, 1944.*

It is true that those assets of the business, as of Feb. 1st, 1944, cannot now be identified. But, if Petitioner is permitted to take over the business; there would be no need for any such identification.

For Petitioner would then be merely reassuming his contract as of Feb. 1st, 1944; and the only difference would be that there would be a longer period between the time of confirmation of sale to Petitioner, and the time at which Petitioner would make settlement for the purchase.

The Receiver in such case would merely turn over to Petitioner, either the remainder of the original assets, or their proceeds, less disbursements meanwhile; and as is called for by the original order for sale.

And thus, all the Receiver would need to do, would be to take out the amount of cash to be held out, as of Feb. 1st, 1944; and to then turn over, all the rest of the business, and of all subsequent proceeds (less disbursements) to Petitioner.

There would thus be no difficulty as to identification of the assets sold, if Petitioner is permitted to take over the business.

Impossibility of Any Identification of the Assets, if the Sale to Respondent Is Upheld.

The matter is altogether different, however, if any attempt is made to complete the sale to Respondent. For the assets that

were supposedly sold to Respondent were the same assets that were offered for sale on May 1st, *under the order for Resale of March 22nd* (R. 467). And those said assets were the assets that were sold to Petitioner on Feb. 1st, 1944.

The difficulty is, however, that those assets of Feb. 1st, were not sold to Respondent as of that date. On the contrary, those assets of Feb. 1st, were resold to Respondent as of May 1st; and the Receiver was authorized to account to Respondent for the proceeds, only after May 1st. (R. 467.)

But between the two sales dates of Feb. 1st, and May 1st, an estimated $130,000 of merchandise was sold out of the $100,000 merchandise stock. And between those two dates, the $30,000 of accounts receivable, had probably been collected twice over; and the amount of the accounts receivable, had been reduced between the two dates by approximately $6,000.

No inventory was taken of the assets as of Feb. 1st; and no inventory was taken as of May 1st; for the appointment of the appraisers was not even authorized until June 29th (R. 496), and their "Appraisal" report was not filed until August 30th. (R. 497.)

The facts thus stand that the assets supposedly resold to Respondent, were the assets that had been sold to Petitioner on Feb. 1st. And those same assets of Feb. 1st, 1944, being then sold to Respondent as of May 1st, 1944; cannot be identified as of May 1st. In consequence, the sale to Respondent cannot be carried out; and even though illegal and void, for so many other reasons, as presently pointed out.

Item 10.

As Item 10, Petitioner calls the attention of the Court to the further falsification of which Counsel for Respondent has been guilty on page 11 of his brief; and in that he attempts to impose on the Court with two different meanings of the words "final settlement" and in less than ten lines apart. For Counsel there says:

> "The original order for sale provided that if either of the parties purchased the assets, he should be entitled *at the final settlement and payment of the purchase price* to use and apply towards the payment of such purchase price, such amount as the Receiver may fairly estimate to be his distributive interest in and to the said partnership assets."

It should be noted that the said Order for Sale (R. 231) required that the purchaser should complete the purchase within thirty days after confirmation. It is obvious then that the final settlement above referred to, was the final settlement and payment of the purchase price, to the Receiver, within the thirty days allowed for the completion of the purchase.

But in the next few lines, Respondent attempts to make a complete change in the meaning of the term "final settlement." For immediately following the quotation above set out, Respondent goes on to say:

> "It was the Receiver's duty to allow Petitioner only such credit as would leave a sufficient balance to protect the Receiver, *in the final settlement.*"

> "The amount of cash to be advanced under this mode of settlement was not final. The exact and final calculations would have been made on the final hearing on distribution of the fund."

The Court may observe, that the final settlement referred to in the first quotation, set out above; was the settlement of the purchase price with the Receiver within the 30 days allowed for that purpose. But the "final settlement" referred to just a few lines later by Respondent; is a mythical settlement, that Respondent has invented to add onto the terms of the Order of Sale.

The Court is further requested to note the change in Respondent's claims, as to the meaning of the terms of the Order for Sale, as Respondent now claims them to be; and as against what he claimed them to mean, when he was moving to have that Order for Sale adopted by the Court.

For on September 15, 1942, Respondent filed a memorandum, in opposition to Petitioner's motion for rehearing, as to the entry of the said Order for Sale. And in that said memorandum (R. 244) Counsel for Respondent urged:

> "Where both parties, as in the present case, are permitted by the order of sale to bid thereat, where each party may use as a credit upon the purchase his estimated distribution from the assets, the order is in all respects fair, and the rationale of *Cresse v. Loper* . . . does not apply."

(R. 246). "In respect to defendant's contention that the Receiver has no power to determine whether plaintiff must account for the $32,000 paid him as salary since June, 1936, it is respectfully submitted that this matter has been completely and finally adjudicated by the Court, and that the rights of the respective partners in and to the assets has been fixed by the confirmation of the Auditor's report."

It may thus be seen that in September, 1942, Counsel for Respondent claimed that the rights and interests of the partners, in and to the assets had been finally adjudicated by the Court; and that the rights of the respective partners in and to the assets, had been fixed by the confirmation of the Auditor's report, of July, 1936.

But after Petitioner had bought the business under that same Order for Sale, then Petitioner's rights and interests, in and to the assets, had no longer been determined by the Auditor's report. But instead Respondent now claimed that Petitioner should be assessed with $60,000 of receivership costs.

Item 11.

The attention of the Court is also requested to the further willful falsification of Counsel for Respondent, on page 11 of his said brief; and to the effect that—

> "Even though the Receiver would not allow Petitioner a credit in the amount to which Petitioner thought he was en-

titled, he lost nothing thereby, for any portion of his share that remained in the Receiver's possession would be paid him at the final accounting."

In other words, Respondent would have the Court believe, that although the Court was holding all of Petitioner's property, and to an amount of perhaps $150,000; that it would make no difference to Petitioner, whether Petitioner had then to raise perhaps $35,000, to pay as the balance due on the property or whether instead, Petitioner had to raise $150,000.

Respondent would also have the Court overlook the fact, that if Petitioner was unable to pay the excess demands of the Receiver, the property would then be resold at Petitioner's risk and cost. And so that thus Petitioner might lose from $50,000 to $100,000 or more, merely because of the illegal demands of the Receiver.

CONCLUSION

As a conclusion to this reply brief, Petitioner can do no better than repeat what Petitioner stated in his Petition; and that is that should Certiorari be granted, and the business be ordered turned over to Petitioner, under the terms of the original Order for Sale, at Petitioner's bid price of $240,500, and as of the original sale date of February 1, 1944, this 13 year receivership can be brought to a speedy close.

On the other hand, if Certiorari is denied, or the sale to Respondent affirmed, then the business will be plunged into further years of litigation.

Respectfully submitted,

EDWIN J. CREEL.